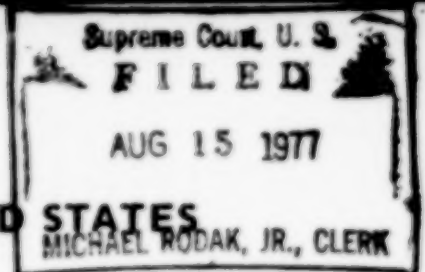


IN THE
SUPREME COURT OF THE UNITED STATES



OCTOBER TERM, 1976

* * *

NO. 76-1334

* * *

DON BORDENKIRCHER, SUPERINTENDENT,
KENTUCKY STATE PENITENTIARY,
Petitioner

V.

PAUL LEWIS HAYES,
Respondent

* * *

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

* * *

BRIEF AMICUS CURIAE ON BEHALF OF
JIMMY HARRIS, MITCHELL RAY RODGERS
AND OTHER TEXAS PRISON INMATES
SIMILARLY SITUATED URGING AFFIRMANCE

* * *

STANLEY G. SCHNEIDER,
Staff Counsel for Inmates

RICHARD A. DAWSON,
Staff Counsel for Inmates

P. O. Box 99
Huntsville, Texas 77340
Telephone: (713) 295-6371

Attorneys for Amicus Curiae,
Movants to Appear Pro Hoc Vice

INDEX

	PAGE
INDEX OF AUTHORITIES	ii
QUESTIONS PRESENTED	1
INTEREST OF AMICUS CURIAE	2
ARGUMENT	
"Whether the Commonwealth's attorney is prohibited from bargaining for a plea of guilty by threatening to bring an additional indictment if an accused does not accept a plea bargain offer?"	5
"Whether the affirmance of the Sixth Circuit's decision will result in the wholesale release of hundreds of convicted felons in Texas?"	9
CONCLUSION	10
CERTIFICATE OF SERVICE	11
APPENDIX "A"	12
APPENDIX "B"	21
APPENDIX "C"	33

INDEX OF AUTHORITIES

CASES	PAGE
Blackledge v. Perry, 417 U.S. 21 (1969)	5,6,8
Chaffin v. Stynchcombe, 412 U.S. 17, 33 n. 20 (1973) .	7
Ex Parte Olvera, 489 S.W.2d 586 (Tex.Crim.App. 1973)	10
Graham v. Richardson, 403 U.S. 365, 374 (1971)	7
Hayes v. Cowan, 547 F.2d 42 (6th Cir. 1976) cert. granted, Bordenkircher v. Hayes, No. 76-1334 (1976)	2,3,4,5,6,7,9,10
Machibroda v. United States, 368 U.S. 487, 493 (1962)	7
NAACP v. Button, 371 U.S. 415, 429 (1963)	7
North Carolina v. Pearce, 395 U.S. 711 (1969)	6,8
Rose v. Hodges, 423 U.S. 19 (1975)	10
Shapiro v. Thompson, 394 U.S. 318, 631 (1969)	7
U.S. v. Jackson, 390 U.S. 570, 581 (1968)	7,8
U.S. v. Jamison, 505 F.2d 407, 416 (D.C.Cir. 1976) .	5,6
United States v. Demarco, 550 F.2d 1224, 1229 (9th Cir. 1977)	8
United States v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976)	6
Whan v. State, 485 S.W.2d (Tex. Crim. App. 1972) .	10
cert. denied, 411 U.S. 934 (1973)	10
STATUTES	
Arizona, Rules of Criminal Procedure, Rule 13.5 ...	5
West Annotated California Statutes § 969(a)	5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

* * *

NO. 76-1334

* * *

**DON BORDENKIRCHER, SUPERINTENDENT,
KENTUCKY STATE PENITENTIARY,**
Petitioner

V.

PAUL LEWIS HAYES,
Respondent

* * *

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

* * *

**BRIEF AMICUS CURIAE ON BEHALF OF
JIMMY HARRIS, MITCHELL RAY RODGERS
AND OTHER TEXAS PRISON INMATES
SIMILARLY SITUATED URGING AFFIRMANCE**

* * *

QUESTIONS PRESENTED

"Whether the Commonwealth's attorney is prohibited from bargaining for a plea of guilty by threatening to bring an additional indictment of an accused does not accept a plea bargain offer?"

"Whether the affirmance of the Sixth Circuit's decision will result in the wholesale release of hundreds of convicted felons in Texas?"

INTEREST OF AMICUS CURIAE

The Staff Counsel for Inmates is an organization sponsored by the Texas Department of Corrections to provide legal representation to indigent prison inmates. The individuals listed below have all requested assistance from the Staff Counsel for the preparation of habeas corpus petitions contesting the validity of their Texas convictions. In each instance, the fact situation is analogous to the facts presented in **Hayes v. Cowan**, 547 F.2d 42 (6th Cir. 1976), cert. granted, **Bordenkircher v. Hayes**, No. 76-1334 (1976). Each of the named individuals, as well as other unknown inmates, would be directly effected by this Court's ruling.

For example, Jimmy Harris, T.D.C. No. 234454, is currently incarcerated in the Ellis Unit of the Texas Department of Corrections serving a life sentence for forgery, enhanced as an habitual criminal, (see Appendix "A" for supporting documentation). Harris was originally indicted in Cause Number B-5811 for the offense of forgery in the 161st Judicial District Court, Ector County, Odessa, Texas. No enhancement allegations were attached to the foregoing indictment. The State's plea offer of eight (8) years, conveyed to Harris by his attorney, Warren Heagy, was rejected on February 23, 1972. Harris was then reindicted in March, 1972. On August 14, 1972, Cause Number B-5811 was dismissed on motion by the State because Harris had been reindicted "as a third offender habitual in Cause Number B-6047;" which alleged the identical forgery charge contained in Cause Number B-5811. On August 21, 1972, W. B. Barnes was appointed to represent Harris, replacing Warren Heagy as his attorney. Harris was tried on October 17, 1972, resulting in his present conviction.

Harris has filed an Application for Writ of Habeas Corpus in the 161st Judicial District Court, Ector County, Texas pursuant to Vernon's Annotated C.C.P. Article 11.07 raising the **Hayes** issue. Upon

exhausting State remedies, Harris Filed an Application for Writ of Habeas Corpus in the United States District Court for the Western District of Texas in Cause Number MO-76-CA-55, which is currently pending before the Honorable D. W. Suttle, United States District Judge.

In another instance, Mitchell Ray Rodgers, T.D.C. No. 248048 is incarcerated in the Ramsey Unit No. 1 of the Texas Department of Corrections serving a life sentence for possession of a controlled substance, to wit: heroin, (see Appendix "B" for supporting documentation). Originally, Rodgers was indicted in Cause Number F-75-566-JH for the felony offense of possession of a controlled substance to wit: heroin. On February 17, 1975, an agreed Motion for Continuance was filed in Cause Number F-75-566-JH signed by Michael L. Morrow and Robert E. Whaley, containing the notation "16 years or reindict as habitual." Mr. Morrow, Rodgers' attorney, has examined his file and confirmed the fact that the Assistant District Attorney indicated that if the defendant did not accept the recommended plea, Rodgers would be reindicted as an habitual criminal. Rodgers was reindicted in Cause Number F-75-2053-JH as an habitual criminal alleging the identical felony offense contained in F-75-566-JH. Rodgers pled not guilty, was convicted by a jury and sentenced to life imprisonment.

Rodgers has not heretofore filed an Application for Writ of Habeas Corpus alleging the question in the instance case.

The vast complexity and importance of the **Hayes** case can best be illustrated by the number of criminal defendants from various metropolitan areas throughout Texas, who have alleged the facts analogous to the **Hayes** situation. Each individual, upon meeting his required burden of proof, would benefit by this Court's affirmance of the Sixth Circuit's decision; listed by counties, the inmates are:

BEXAR — Maurice L. Sigard, Lonnie E. Woodard;

DALLAS — Lester S. Chambers, Donald W. DuBose, Ignacio Espinosa, Joe Edward Farley, Jay Hickey, Thomas E. Hill, Jerry Lee Johnson, Jerry Wade Johnson, Rudy O. Juarez, Virgil Lawson, Ronnie W. Lowrance, James L. Mitchell, Robert Montgomery, Billy Joe Norris, Billy J. Roberson, Johnny L. Smith, Roy Thrash, James H. Turner, Bailey Williams, Paul Yarborough;

ECTOR — Daniel C. Cooper, Jimmy Lee Grant;

EL PASO — Eugene Anderson, Francisco Cadena;

GRAY — Robert L. Dunbar;

HARRIS — Jerry Lee Bates, William Browne, Albert C. Dalton, Albert G. Garcia, George G. Gonzales, Harry L. Hawkins, Abron Martin, Delbert L. Plessinger, Samuel G. Sanchez, Noel H. Saucier, Clinton L. Shaw;

HUNT — Roland Carroll;

LUBBOCK — Charlie Rodriguez;

McLENNAN — Johnny Lee Robinson;

NUECES — Edward M. Williams;

POTTER — Glenn E. Taylor;

TARRANT — Harvey Mulkey, Abraham R. Saucedo;

TRAVIS — James H. Garcia, Tommy Sloane, Bobby G. Wilson;

WICHITA — Julio Gonzales.

The foregoing list of inmates indicates that the procedure condemned by the Sixth Circuit is most

frequently practiced in metropolitan areas throughout Texas. Affidavits from some of the attorneys in the foregoing listed counties attest that defendants are often reindicted as habitual criminals for refusing to plead guilty and asserting their right to a jury trial, (see Appendix "C"). Therefore, Amicus supports the affirmance of the Sixth Circuit's decision.

ARGUMENT

"Whether the Commonwealth's attorney is prohibited from bargaining for a plea of guilty by threatening to bring an additional indictment if an accused does not accept a plea bargain offer?"

The Sixth Circuit's decision has been characterized by the Petitioner as undermining plea bargaining, and habitual criminal prosecutions in our criminal justice system and asserts that the decision attacks the orderly administration of "justice." This is not the purpose nor the meaning of the Sixth Circuit's decision.

Rather, the **Hayes'** decision places a legitimate limitation on prosecutorial discretion. The **Hayes'** opinion mandates that absent reasonable justification,^{1/} a prosecutor may not use the threat of further prosecution to induce a criminal defendant to plead guilty. The defendant's assertion of a constitutional right is not sufficient justification to warrant an accused's reindictment which would

^{1/}

Several states recognize a prosecutor's right to reindict a defendant with an habitual indictment when it is first discovered that he-she has a prior criminal record. See Arizona, Rules of Criminal Procedure, Rule 13.5; West Ann. California Statutes § 969(a). See also **Blackledge v. Perry**, 417 U.S. 21 (1969); **U.S. v. Jamison**, 505 F.2d 407, 416 (D.C. Cir. 1976).

result in an automatic life sentence upon a jury's finding of guilt.

This Court's decision in **North Carolina v. Pearce**, 395 U.S. 711, (1969) and **Blackledge v. Perry**, 417 U.S. 21 (1974), assures that defendants who assert procedural rights must be treated in a manner which avoids any suggestion of vindictiveness or retaliatory motivations. **Blackledge** emphasized that the prosecution should not be allowed to behave in a manner that even suggests a retaliatory motivation. **Blackledge** has been applied by several circuit courts in situations wherein defendants have asserted procedural or statutory rights. The rights asserted have varied from requests for a mistrial, **United States v. Jamison**, 505 F.2d 407 (D.C. Cir.1974), to being tried by a district judge; **United States v. Ruesga-Martinez**, 534 F.2d 1367 (9th Cir. 1976).

The application of the prophylactic rule established in **Pearce** and **Blackledge** can not be distinguished from the egregious facts presented in the **Hayes** case. Kentucky admits that the only reason Paul Lewis Hayes is presently serving a life sentence is his assertion of rights inherent to our judicial system. Kentucky's only justification for Hayes' reindictment was its desire to save the time and expense accompanying "a needless jury trial." The record clearly reveals the prosecutor's threat and the resulting execution of that threat.

If the only objective of a state practice is to discourage the assertion of constitutional rights, it is patently unconstitutional. **Chaffin v. Stynchcombe**, 412 U.S. 17, 33 n. 20 (1973); **Shapiro v. Thompson**, 394 U.S. 618, 631 (1969); **U.S. v. Jackson**, 390 U.S. 570, 581.

In **Machibroda v. United States**, 368 U.S. 487, 493 (1962) this Court held:

A plea of guilty, if induced by promises or threats (of increased charges, acts to) deprive (the plea) of the character of a voluntary act, is void.

This implies a denial of due process when the defendant opts for a jury trial, the State increases the charges and prosecutes. Kentucky attempts to classify its interaction with the accused as "plea bargaining." The applied use of the label "plea bargaining" does not permit the prosecutor to exaggerate the definition of this concept.^{2/} As noted by the Sixth Circuit:

The legitimate purposes of plea bargaining are not served if a prosecutor abuses his powers in order to coerce an unwilling defendant into foregoing his constitutional rights to trial. **Hayes** 547 F.2d at 44.

The record further implies that the only time the habitual criminal statute is applied in an impermissible discriminatory manner is when a criminal defendant insists on his right to a trial by jury and not to those who "trade out" by a plea of guilty. In the case at bar, Kentucky has emphatically stated the reasons for its use of the Habitual Criminal Act. It warns other accused multiple offenders of the consequences of their

2/

A state may not attempt to justify the deprivation of fundamental constitutional rights by resorting to "mere labels," **NAACP v. Button**, 371 U.S. 415, 429 (1963); **Graham v. Richardson**, 403 U.S. 365, 374 (1971).

asserting constitutional rights.^{3/} The inevitable effect of the State practice is to discourage the assertion of constitutional rights by penalizing those who choose to exercise them; such a practice must be patently unconstitutional.

Kentucky cannot demonstrate that the reason for the increased charges against an accused after the assertion of a constitutional right is justified either: (1) to promote a compelling State interest, or (2) is rationally related to a legitimate State interest. No viable justification can be proffered by Kentucky for Hayes' reindictment, prosecution and life sentence.

The prophylactic rule of **Pearce and Blackledge** has been designed not only to relieve the defendant who has asserted a right from bearing the burden of the State's response, but also to prevent the "chilling exercise of such rights by other defendants who must make their choice under similar circumstances in the future." **United States v. Demarco**, 550 F.2d 1224, 1229 (9th Cir. 1977).

It was not constitutionally permissible for Kentucky to threaten to "up the ante" to discourage Hayes from exercising his right to a jury trial; a

3/

Again, Amicus would point out that it is not condemning "plea bargaining" rather, it is the impermissible burden placed on the accused in a threatening manner when the accused asserts a constitutional right. As noted by this Court in **United States v. Jackson**, 390 U.S. 570, 584, (1968):

A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of constitutional rights.

fortiori, it was constitutionally impermissible to follow up the threat with the habitual indictment.

"Whether the affirmance of the Sixth Circuit's decision will result in the wholesale release of hundreds of convicted felons in Texas?"

Contrary to the position of the State of Texas, plea bargaining will not be destroyed and our criminal justice system will not collapse because of the affirmance of the Sixth Circuit's decision. The affirmance also will not open the proverbial "floodgate" to the prison. Indeed, the ultimate ends of justice will be furthered by the enlightened balance between coercion and legitimate plea bargaining which the Sixth Circuit has carefully adopted.

Before a Texas inmate could benefit from the Hayes' decision he-she must prove four facts:

1. prior to being indicted as an habitual criminal, he-she was indicted solely on the primary charge;
2. while indicted on the primary offense, the State offered the inmate an opportunity to plead guilty for a specific term of years;
3. after refusing the initial bargain, the prosecutor **threatened** the inmate with reindictment as an habitual criminal;
4. after the inmate's continued refusal to plead guilty, the State reindicted the inmate as an habitual criminal.

All of the foregoing facts must be proved before relief can be granted.

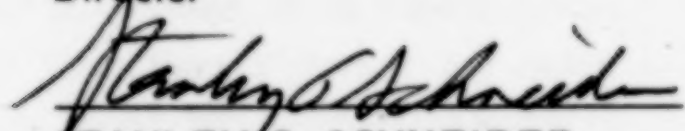
Further, the Hayes' decision need not effect the adjudication of guilt but can be limited to abrogating the ultimate sentence. It does not

necessarily follow that reversal of an individual's conviction because of an invalid sentencing procedure will result in an automatic release from prison. On the contrary, Texas law provides for two alternatives to resentence inmates effected by the Hayes' decision. First, when the punishment phase of a trial is invalidated and the habitual counts dismissed, the defendant may be retried on the primary charge originally alleged. **Ex Parte Olvera**, 489 S.W.2d 586 (Tex. Crim. App. 1973). A second alternative, practiced in Texas in situations where a sentencing procedure is invalidated by an appellate court ruling, is commutation by the Governor of the individual's sentence for a term of years permitted for the primary charge. The Governor has the constitutional authority to commute an individual's sentence which would render the invalidated sentence a nullity but would result in the upholding of the conviction. **Whan v. State**, 485 S.W.2d (Tex. Crim. App. 1972); **cert. denied**, 411 U.S. 934 (1973); **Rose v. Hodges**, 423 U.S. 19 (1975).

CONCLUSION

For the foregoing reasons, Amicus would urge that this Honorable Court affirm the Sixth Circuit's decision.

Respectfully submitted,
Wm. LOUIS WHITE,
Director



STANLEY G. SCHNEIDER,
RICHARD A. DAWSON,
Staff Counsel for Inmates
P.O. Box 99
Huntsville, Texas 77340
Attorneys for Amicus Curiae,
Movants to Appear Pro Hoc Vice

CERTIFICATE OF SERVICE

I, Stanley G. Schneider, a member of the Staff Counsel for Inmates, on behalf of Amicus Curiae, as Movant to Appear Pro Hoc Vice, enter my appearance in this cause and do hereby certify that true and correct copies of the foregoing Brief of Amicus Curiae on Behalf of Jimmy Harris, Mitchell Ray Rodgers and Other Texas Prison Inmates Similarly Situated Urging Affirmance have been forwarded by United States Mail, postage prepaid, first class, certified, on this the ____ day of August, 1977, addressed as follows:

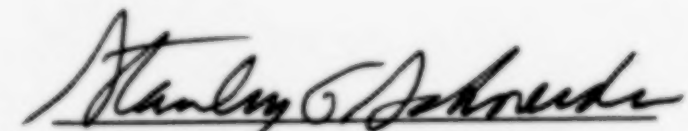
Robert F. Stephens,
Attorney General

Robert L. Chenoweth,
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

Counsel for Petitioners

J. Vincent Aprile, II,
Assistant Deputy Public
Defender
Frankfort, Kentucky 40601

Counsel for Respondent



STANLEY G. SCHNEIDER,
Attorney for Amicus Curiae,
Movant to Appear Pro Hoc Vice

APPENDIX "A"

A F F I D A V I T

STATE OF TEXAS)
)
COUNTY OF ECTOR)

My name is Warren Heagy. I am an attorney at law, and practice my profession in Odessa, Ector County, Texas. On the 17th day of February, 1972, I was appointed by Judge C. V. Milburn to represent a defendant by the name of Jimmy Harris in two causes which were pending against him in the 161st Judicial District Court of Ector County, Texas. The cause numbers were #B-5811 and #A-5844. The Defendant, Jimmy Harris, was indicted in Cause No. B-5811 for forgery, and in Cause No. A-5844 for burglary. I do not remember Mr. Harris or any of the circumstances surrounding my representation of him, but at the request of Stanley Schneider, I checked my closed file on the Defendant, Jimmy Harris, and found that I had noted on the outside of the file the following words:

"Bobo == offered 8 years February 23, 1972".

This indicates to me that Jim Bobo, the Assistant District Attorney of Ector County, at that time, had offered Mr. Harris a plea bargain deal wherein he would let the Defendant Harris plead guilty to both charges pending against him for eight years service in the Texas Department of Corrections Institute.

The original indictments for burglary and forgery were not enhanced or habitual, but were for simple burglary and forgery.

As I have previously stated, I honestly cannot remember any of the details of my representation of Mr. Harris, but my file reflects that on June 19, 1972, I wrote the Honorable Judge R. L. McKim a letter stating that the Defendant, Jimmy Harris, had requested that I not represent him in the two causes in which I had been appointed, and I respectfully requested the Court's permission to withdraw from the cases. On the same letter that I wrote to Judge McKim, I received Judge McKim's reply, which was as follows:

"Sorry, Warren, I can't let the prisoners pick their own lawyers, so you and he will have to patch up your differences.".

Evidently, sometime after June 19, 1972, I was allowed to withdraw from the Defendant Harris' case because it is my understanding that another attorney was appointed for him, and that he was subsequently re-indicted as a

habitual criminal and received a life sentence.

WARREN HEAGY

SUBSCRIBED AND SWORN TO BEFORE ME by the said WARREN HEAGY, on this the 22nd day of April, 1977.

(SEAL)

Notary Public, Ector County, Texas
My Commission Expires: 12-11-77

THE STATE OF TEXAS)

COUNTY OF ECTOR)

BEFORE ME, a Notary Public, on this day personally appeared WARREN HEAGY, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND SEAL OF OFFICE this the 22nd day of April, 1977, to certify which, witness my hand and seal of office.

Notary Public, Ector County, Texas
My Commission Expires: 12-11-77

(SEAL)

BEST COPY AVAILABLE

JOSEPH V. GIBSON, III
ASSOCIATE

W. R. BARNES
ATTORNEY AT LAW
ODESSA, TEXAS 79701

SUITE 210
AMERICAN BANK BLDG.

March 4, 1977

AREA 918
332-8278

Mr. Stanley Schneider
Attorney at Law
Staff Counsel for Inmates
Box 99
Huntsville, Texas 77340

Re: State of Texas vs. Jimmy
Harris, Ector County, Texas

Dear Mr. Schneider:

I checked the records at the District Clerk's office after talking with you. The original action filed against Jimmy Harris was cause number B-5,811, in the 161st District Court, Ector County, Texas. On February 17, 1972 the Court appointed Warren Heagy to represent Mr. Harris. Mr. Heagy's address is 217 West 3rd Street, Odessa, Texas. The order of dismissal entered in this cause August 14, 1972, states that it was being dismissed in order to reindict him as a habitual criminal in cause number B-6,047.

Cause number B-6047 was the cause he was actually tried under. I was appointed to represent him August 21, 1972 and trial was on October 17, 1972. The indictment was in March, 1972.

I trust this information will help you. If I can do anything further, please let me know.

Very truly yours,

W. R. Barnes
W. R. Barnes

WRB/vp

5-11-77

CAUSE NO. B-5811

THE STATE OF TEXAS

VS.

JIMMY HARRIS

IN THE DISTRICT COURT

OF ECTOR COUNTY, TEXAS

161ST JUDICIAL DISTRICT

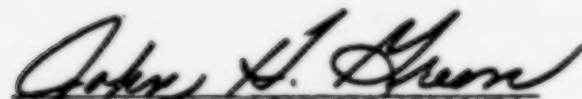
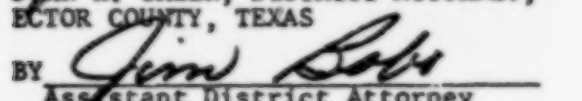
MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES JOHN H. GREEN, District Attorney in and for Ector County, Texas, and moves the Court to dismiss the above entitled and numbered criminal action as to the defendant,

JIMMY HARRIS,

for the reason that the Defendant has been reindicted as a third offender habitual in Cause No. B-6047.


JOHN H. GREEN, DISTRICT ATTORNEY,
ECTOR COUNTY, TEXAS
BY 
Assistant District Attorney

ORDER OF DISMISSAL

ON THIS the 16 day of August, 19 72,
came on to be heard the motion of the State's Attorney filed
herein, as above, asking permission of the Court to dismiss
this criminal action as to the defendant, JIMMY HARRIS

, which motion having been
heard by the Court, and the Court being of the opinion that
the reason so stated is good and sufficient to authorize such
dismissal;

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED by
the Court that this criminal action be, and the same is hereby
dismissed as to the defendant, JIMMY HARRIS,
and that such defendant be discharged.


JUDGE PRESIDING

THE STATE OF TEXAS I

COUNTY OF ECTOR I

I, WANDA McMANN, CLERK of the 161st District
Court in and for Ector County, Texas, do hereby certify that the
above and foregoing is a true and correct copy of:

Motion to Dismiss and Order of Dismissal

In Cause No. B-5811

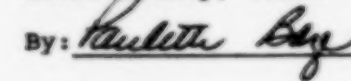
Styled The State of Texas

vs. Jimmy Harris

as the same appears from the original now on file and of record
in this office.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT at Odessa,
Texas, this the 7th day of March, 19 77

WANDA McMANN, District Clerk
Ector County, Texas

By:  Deputy

APPENDIX "B"

JUL 11 1977

MCCULLOCH, MCDOWELL & MORROW
ATTORNEYS AND COUNSELORS AT LAW
1025 ELM STREET, SUITE 600
DALLAS, TEXAS 75202

ANDREW MCCULLOCH, JR.
SCOTT MCDOWELL
MICHAEL L. MORROW

July 6, 1977

UNITED FIDELITY LIFE BUILDING
AREA CODE 214
742-3030

Mr. Stanley Schneider
Staff Counsel for Inmates
P. O. Box 99
Huntsville, Texas 77340

Re: Wesley James Raven
Robbery Case
Dallas County

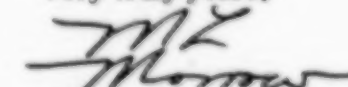
Mitchell Ray Rogers
Possession of Heroin Case
Dallas County

Dear Mr. Schneider:

Concerning Wesley James Raven, my case notes show that the Assistant District Attorney made a plea recommendation of 25 years in the penitentiary to me on January 14, 1975. Announcement day on Defendant's cases was January 15, 1975, and a trial date in early February was set. Between these two dates, a reindictment of the aggravated robbery charge with enhancement punishment counts was returned by the Grand Jury on January 27, 1975. My notes do not show whether the Assistant District Attorney indicated the reindictment was because of the Defendant's failure to accept his plea recommendation of 25 years. Normally, I do note such conversations in my file.

Concerning Mitchell Ray Rogers, my case notes indicate that on February 17, 1975, the Assistant District Attorney prosecuting the case indicated that if Defendant did not accept 16 years on a recommended plea, he would be reindicted with enhancement counts making life sentence automatic as an habitual criminal.

Very truly yours,


MICHAEL L. MORROW

MLM/sch

THE STATE OF TEXAS |
COUNTY OF DALLAS |

BEFORE ME, the undersigned authority, on this day personally appeared MICHAEL L. MORROW, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, this 6th day of July, 1977.

My Commission Expires:

7/8/77


NOTARY PUBLIC in and for Dallas County,
Texas

AFFIDAVIT OF MITCHELL RAY RODGERS

THE STATE OF TEXAS,
COUNTY OF BRAZORIA.

BEFORE ME, the undersigned authority, on this day personally appeared MITCHELL RAY RODGERS, who, being by me duly sworn, upon his oath deposes and says:

"I, MITCHELL RAY RODGERS, TDC #248048, of the Ramsey Unit #1 of the Texas Department of Corrections, Otey CPO Box 1, Rosharon, Brazoria County, Texas, make the following statement and declare the same to be true and correct:

"That, on April 9, 1975, I was convicted, upon a plea of Not Guilty to a jury, of the felony offense of Possession of a Controlled Substance to wit: heroin [habitual] in Cause No. F-75-2053-JH in Criminal District Court No. 1 of Dallas County, Texas, and sentenced to LIFE imprisonment in the Texas Department of Corrections.

"That, on January 27, 1975, I was indicted in Cause No. F-75-366-JH on only the primary offense of Possession of a Controlled Substance to wit: heroin. Through my attorney, Mr. Michael L. Morrow of Dallas, Texas, the Assistant District Attorney offered me a plea bargain of sixteen (16) years in exchange for my guilty plea or threatened to re-indict me as an habitual criminal if I failed to accept this offer. However, I rejected the offer and elected to go to trial on a plea of Not Guilty to the primary offense.

"As a result of my election to go to trial, on February 24, 1975, I was re-indicted as an habitual criminal in Cause No. F-75-2053-JH. As a direct result of the re-indictment, I was compelled to plead Not Guilty and received my LIFE sentence."


MITCHELL RAY RODGERS, Affiant.

SWORN TO AND SUBSCRIBED before me by the said MITCHELL
RAY RODGERS on this the 08 day of June, 1977, to certify
which witness my hand and seal of office.

Randall A. Bush
NOTARY PUBLIC in and for
Brasoria County, Texas.

My Commission Expires: August 01, 1978
RANDALL A. BUSH

CRIMINAL DISTRICT COURT
DALLAS COUNTY, TEXAS

THE STATE OF TEXAS

VS.
MITCHELL RAY RODGERS
~~STOCK: 00000000000000000000~~

No. ~~0000000000~~
F75-566-JH
F75-567-JH

AGREED ORDER OF CONTINUANCE

COMES NOW THE DEFENDANT, by and through his attorney of record, and the District Attorney of
Dallas County, Texas, and would show the Court as follows:

1. The defendant (IS) ~~(IS NOT)~~ present. Jail
2. The District Attorney, on a plea of guilty, recommends:
16 yrs or will RE-INDICT AS HABITUAL TDC JAIL

PRO FINE

3. This cause is passed by agreement to 4-7-75
(DATE)

for Jail
(ANNOUNCEMENT - PLEA - TRIAL - HEARING - INVEST. - DISMISSAL)

4. The defendant's presence at next setting ~~waived~~ (IS NOT) waived. Jail

[Signature]
(ASSISTANT DISTRICT ATTORNEY)

Mike Morrow
(ATTORNEY FOR DEFENDANT)

(DEFENDANT)

PHONE: 742-3030

Approved by _____
(JUDGE)

Date 17 February 1975

NOTE: Defendant's presence required on ALL dispositive settings.

BEST COPY AVAILABLE

APPENDIX "C"

STATE OF TEXAS §

COUNTY OF HARRIS §

AFFIDAVIT

BEFORE ME, the undersigned authority, did personally appear LARRY SAUER, who, after being duly sworn, deposes as follows:

My name is Larry Sauer, and I am a resident of Harris County, Texas. I have been admitted to practice before the Supreme Court of Texas since April 7, 1971. In the course of my practice, I have had an opportunity to represent several persons, charged with felony offenses. The State offered the defendants a number of years in exchange for my clients' guilty plea. Had clients refused, the State would reindict them as habitual criminals.

It is a common practice in Harris County, Texas, for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.


LARRY SAUER, Affiant

SUBSCRIBED AND SWORN TO before me by the said LARRY SAUER, this the 25th day of July, 1977, to certify which witness my hand and seal of office.


NOTARY PUBLIC IN AND FOR
HARRIS COUNTY, TEXAS

STATE OF TEXAS |
COUNTY OF Harris |

AFFIDAVIT

JUL 24 1977
JUL 26 1977

BEFORE ME, the undersigned authority, Carmen Garcia
Michael J.
Donahue, did personally appear
Donahue, who after being duly sworn, deposes as follows:
My name is Michael J. Donahue, and I am a re-
sident of Harris County, Texas. I have been admitted to
practice before the Supreme Court of Texas since 1975.
In the course of my practice, I have had an opportunity to represent
L. D. Prodan, charged with the felony offense
of Theft. The State offered the defendant
20 years in exchange for my client's guilty plea. My
client refused and the State reindicted him/her as an habitual crimi-
nal.

It is a common practice in Harris County, Texas for the
State to reindict a defendant as an habitual criminal when he/she re-
fuses to plead guilty and asserts his/her right to a jury trial.

Michael J. Donahue
Affiant

STATE OF TEXAS |
COUNTY OF _____ |

SUBSCRIBED AND SWORN TO before me by the said Michael J. Donahue
Donahue, this the 25th day of July, 1977, to
certify which witness my hand and seal of office.

Carmen J. Garcia
NOTARY PUBLIC in and for
Harris County, Texas

STATE OF TEXAS |
COUNTY OF HARRIS |

AFFIDAVIT

BEFORE ME, the undersigned authority, J. Ronald Kercher
DAVID B. ZIEGLER
DAVID B. ZIEGLER, did personally appear
DAVID B. ZIEGLER, who after being duly sworn, deposes as follows:
My name is DAVID B. ZIEGLER, and I am a re-
sident of HOUSTON, HARRIS County, Texas. I was admitted to prac-
tice before the Supreme Court of Texas in 1972.
In the course of my practice, I have had an opportunity to represent
HORACE GENE REDFORD, charged with the felony offense
of THEFT, 3rd Offender. The State offered the defendant
THREE (3) years in exchange for my client's guilty plea. My
client refused and the State reindicted him/~~her~~ as an habitual crimi-
nal.

It is a common practice in HARRIS County, Texas for the
State to reindict a defendant as an habitual criminal when he/she re-
fuses to plead guilty and asserts his/her right to a jury trial.

David B. Ziegler
Affiant

STATE OF TEXAS |
COUNTY OF HARRIS |

SUBSCRIBED AND SWORN TO before me by the said DAVID B. ZIEGLER
DAVID B. ZIEGLER, this the 22nd day of July, 1977, to
certify which witness my hand and seal of office.

J. Ronald Kercher
NOTARY PUBLIC in and for
HARRIS COUNTY, TEXAS

STATE OF TEXAS
COUNTY OF Harris

AFFIDAVIT

BEFORE ME, the undersigned authority, Marilyn Franklin
_____, did personally appear Michael J. Thibodeaux
_____, who after being duly sworn, deposes as follows:

My name is Michael J. Thibodeaux, and I am a re-
sident of Harris County, Texas. I was admitted to prac-
tice before the Supreme Court of Texas in December 10, 1972.
In the course of my practice, I have had an opportunity to represent
(Court records name), charged with the felony offense
of Aggravated Robbery. The State offered the defendant
20 years in exchange for my client's guilty plea. My
client refused and the State reindicted him/her as an habitual crimi-
nal.

It is a common practice in Harris County, Texas for the
State to reindict a defendant as an habitual criminal when he/she re-
fuses to plead guilty and asserts his/her right to a jury trial.

Michael J. Thibodeaux
Affiant

STATE OF TEXAS
COUNTY OF _____

SUBSCRIBED AND SWORN to before me by the said Michael J. Thibodeaux
_____, this the 27th day of July, 1977, to
certify which witness my hand and seal of office.

Marilyn J. Franklin
NOTARY PUBLIC in and for

STATE OF TEXAS
COUNTY OF HARRIS

AFFIDAVIT

BEFORE ME, the undersigned authority, Margaret Hall
_____, did personally appear JAMES R. MORIARTY
_____, who after being duly sworn, deposes as follows:

My name is JAMES R. MORIARTY, and I am a re-
sident of Houston, Harris County, Texas. I was admitted to prac-
tice before the Supreme Court of Texas in October, 1976.
In the course of my practice, I have had an opportunity to represent
Leroy Smith, charged with the felony offense
of Theft and Burglary. The State offered the defendant
8 years in exchange for my client's guilty plea. My
client refused and the State reindicted him/her as an habitual crimi-
nal.

It is a common practice in Harris County, Texas for the
State to reindict a defendant as an habitual criminal when he/she re-
fuses to plead guilty and asserts his/her right to a jury trial.

James R. Moriarty
Affiant James R. Moriarty

STATE OF TEXAS
COUNTY OF Harris

SUBSCRIBED AND SWORN TO before me by the said James R. Moriarty
_____, this the 22 day of July, 1977, to
certify which witness my hand and seal of office.

Margaret Hall
NOTARY PUBLIC in and for
Harris County, TEXAS

STATE OF TEXAS !
COUNTY OF Dallas !

AFFIDAVIT

BEFORE ME, the undersigned authority, _____,
_____, did personally appear LINDSEY ENDERBY
_____, who after being duly sworn, deposes as follows:

My name is LINDSEY ENDERBY, and I am a re-
sident of Dallas County, Texas. I was admitted to prac-
tice before the Supreme Court of Texas in 1971.
In the course of my practice, I have had an opportunity to represent
James Oliver Grant, charged with the felony offense
of Agg Rob. The State offered the defendant
5 years in exchange for my client's guilty plea. My
client refused and the State reindicted him/her as an habitual crimi-
nal.

It is a common practice in Dallas County, Texas for the
State to reindict a defendant as an habitual criminal when he/she re-
fuses to plead guilty and asserts his/her right to a jury trial.

Lindsey Enderby
Affiant

STATE OF TEXAS !
COUNTY OF Dallas !

SUBSCRIBED AND SWORN TO before me by the said Lindsey
Enderby, this the 25th day of July, 1977, to
certify which witness my hand and seal of office.

Gloria Erickson
NOTARY PUBLIC in and for
GLORIA ERICKSON, Notary Public
in and for Dallas County, Texas
My Commission Expires 12/29/77

BEST COPY AVAILABLE

STATE OF TEXAS !
COUNTY OF DALLAS !

AFFIDAVIT

BEFORE ME, the undersigned authority, Notary Public,
_____, did personally appear Chuck Miller
_____, who after being duly sworn, deposes as follows:

My name is Chuck Miller, and I am a re-
sident of Dallas County, Texas. I was admitted to prac-
tice before the Supreme Court of Texas in 1972.
In the course of my practice, I have had an opportunity to represent
Willie D. Cary, charged with the felony offense
of burglary of a habitation #F75-10074-1. The State offered the defendant
10 years in exchange for my client's guilty plea. My
client refused and the State reindicted him/~~her~~ as an habitual crimi-
nal, and tried him as such.

It is a common practice in Dallas County, Texas for the
State to reindict a defendant as an habitual criminal when he/~~she~~ re-
fuses to plead guilty and asserts his/~~her~~ right to a jury trial.

Chuck Miller
Affiant

STATE OF TEXAS !
COUNTY OF Dallas !

SUBSCRIBED AND SWORN TO before me by the said Chuck
Miller, this the 26th day of July, 1977, to
certify which witness my hand and seal of office.

Norma L. Luper
NOTARY PUBLIC in and for
Dallas County, Texas

JUL 29 1977


AFFIDAVIT

BEFORE ME, the undersigned authority,

_____ did personally appear RICHARD ALAN
ANDERSON, who after being duly sworn, deposes as follows:


My name is RICHARD ALAN ANDERSON, and I am a resident of DALLAS, DALLAS County, Texas. I was admitted to practice before the Supreme Court of Texas in September, 1973. In the course of my practice, I have had an opportunity to represent CANDACE ROBERTSON, charged with the felony offense of AGGRAVATED ROBBERY. The State offered the defendant 5 years in exchange for my client's guilty plea. My client refused and the State reindicted him/her as an habitual criminal.

It is a common practice in DALLAS County, Texas for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.


Affiant

STATE OF TEXAS
COUNTY OF Dallas

SUBSCRIBED AND SWORN to before me by the said RICHARD ALAN ANDERSON, this the 27th day of July, 1977, to certify which witness my hand and seal of office.


PUBLIC in and for
GLORIA ERICKSON, Notary Public
in and for Dallas County, Texas
Commission Expires 12/29/77


AFFIDAVIT

BEFORE ME, the undersigned authority, a Notary Public in and for
Harris County, Texas, did personally appear MARVIN O. TEAGUE

_____, who after being duly sworn, deposes as follows:

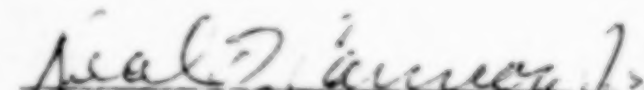
My name is MARVIN O. TEAGUE, and I am a resident of HOUSTON, HARRIS County, Texas. I was admitted to practice before the Supreme Court of Texas in 1961. In the course of my practice, I have had an opportunity to represent _____, charged with the felony offense of _____. The State offered the defendant _____ years in exchange for my client's guilty plea. My client refused and the State reindicted him/her as an habitual criminal.

It is ~~a common~~ practice in HARRIS County, Texas for the State to reindict a defendant as an habitual criminal when he/she refuses to plead guilty and asserts his/her right to a jury trial.


Affiant

STATE OF TEXAS
COUNTY OF HARRIS

SUBSCRIBED AND SWORN to before me by the said MARVIN O. TEAGUE, this the 27th day of July, 1977, to certify which witness my hand and seal of office.


NOTARY PUBLIC in and for
Harris County, Texas

BEST COPY AVAILABLE

STATE OF TEXAS
COUNTY OF HARRIS

AUG 01 1977

AFFIDAVIT

BEFORE ME, the undersigned authority, a Notary Public in and for
Harris County, Texas, did personally appear DAVID K. BILES

_____, who after being duly sworn, deposes as follows:

My name is DAVID K. BILES, and I am a re-
sident of HARRIS County, Texas. I was admitted to prac-
tice before the Supreme Court of Texas in SEPTEMBER 1971.
In the course of my practice, I have had an opportunity to represent
_____, charged with the felony offense
of _____. The State offered the defendant
_____ years in exchange for my client's guilty plea. My
client refused and the State reindicted him/her as an habitual crimi-
nal.

It is a common practice in HARRIS County, Texas for the
State to reindict a defendant as an habitual criminal when he/she re-
fuses to plead guilty and asserts his/her right to a jury trial.

David K. Biles
Affiant

STATE OF TEXAS
COUNTY OF HARRIS

SUBSCRIBED AND SWORN to before me by the said DAVID K. BILES
this the 29th day of JULY, 1977, to
certify which witness my hand and seal of office.

Neal D. Cannon, Jr.
NOTARY PUBLIC in and for

STATE OF TEXAS
COUNTY OF HARRIS

AFFIDAVIT

BEFORE ME, the undersigned authority, A Notary Public in and for
Harris County, Texas, did personally appear Neal D. Cannon, Jr.

_____, who after being duly sworn, deposes as follows:

My name is Neal D. Cannon, Jr., and I am a re-
sident of Houston, Harris County, Texas. I was admitted to prac-
tice before the Supreme Court of Texas in 1965.
In the course of my practice, I have had an opportunity to represent
_____, charged with the felony offense
of _____. The State offered the defendant
_____ years in exchange for my client's guilty plea. My
client refused and the State reindicted him/her as an habitual crimi-
nal.

not an unusual
It is ~~not an unusual~~ practice in Harris County, Texas for the
State to reindict a defendant as an habitual criminal when he/she re-
fuses to plead guilty and asserts his/her right to a jury trial.

Neal D. Cannon, Jr.
Affiant

STATE OF TEXAS
COUNTY OF HARRIS

SUBSCRIBED AND SWORN TO before me by the said Neal D. Cannon, Jr.
this the 29th day of July, 1977, to
certify which witness my hand and seal of office.

Mary L. Shank
NOTARY PUBLIC in and for
Harris County, Texas